QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioner did not qualify for the "housing for older persons" exemption from the prohibition against familial status discrimination under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1703

MAINLANDS SECTION 1 AND 2 CIVIC ASSOCIATION, INC., PETITIONER

v.

JOSEPH W. MASSARO, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 3 F.3d 1472. The opinion of the district court (Pet. App. 25a-39a) is reported at 796 F. Supp. 1499.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1993. A petition for rehearing was denied on February 1, 1994. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on April 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, Congress amended the Fair Housing Act (Act) to prohibit discrimination in housing on the basis of familial status. 42 U.S.C. 3604. "Familial status" means "one or more individuals (who have not attained the age of 18 years) being domiciled with * * * a parent or another person having legal custody of such individual or individuals or * * * the designee of such parent or other person." 42 U.S.C. 3602(k). The Act thus prohibits discrimination based on the fact that a family unit contains a person under 18 years of age.

An exemption from the familial status provisions exists with regard to "housing for older persons," thus permitting such housing to exclude persons under 18 years of age in certain circumstances. 42 U.S.C. 3607(b)(1). To qualify for the exemption, "housing for older persons" must fall within one of three statutory categories: housing provided under a government program specifically designed and operated for elderly persons (42 U.S.C. 3607(b)(2)(A)); housing intended for, and occupied solely by, persons 62 years of age or older (42 U.S.C. 3607(b)(2)(B)); or housing "intended and operated for occupancy by at least one person 55 years of age or older per unit." 42 U.S.C. 3607(b)(2)(C).

With regard to the "55 years or older" category, Congress provided that the Secretary of the Department of Housing and Urban Development (HUD) was to develop regulations that impose at least three specified requirements. 42 U.S.C. 3607(b)(2)(C). The three qualifying requirements are:

> (i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that

such housing is necessary to provide important housing opportunities for older persons; and

(ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

42 U.S.C. 3607(b)(2)(C)(i)-(iii). The Secretary has promulgated regulations that list factors to consider when determining whether a housing provider has complied with the third of these requirements (publishing and adhering to policies and procedures that demonstrate an intent to provide housing for persons 55 years of age or older). See 24 C.F.R. 100.304(c)(2).[1]

2. The Mainlands Section 1 & 2 (Mainlands) is a residential subdivision in Tamarac, Florida, comprised of 529 single-family homes. The 529 homeowners own their property in the Mainlands in fee simple, subject to a recorded Declaration of Restrictions (Declaration). Pet. App. 5a. Petitioner Mainlands Section 1 & 2 Civic Association, Inc., is charged with enforcing the Declaration. *Ibid.* The Declaration restricts permanent residents in the Mainlands to persons 16 years of age or older. *Ibid.*

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[1] The six listed factors are: "(i) The manner in which the housing facility is described to prospective residents. (ii) The nature of any advertising designed to attract prospective residents. (iii) Age verification procedures. (iv) Lease provisions. (v) Written rules and regulations. (vi) Actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations." 24 C.F.R. 100.304(c)(2).

It does not impose any limitation generally on persons under age 55 or impose any other age limitations.

This case arose out of petitioner's attempts to force two couples to remove their infant children from their Mainlands homes. In September, 1989, petitioner sent a letter to respondents Joseph and Patricia Massaro, who lived in the Mainlands with their infant son, advising them that their son's presence violated the Declaration and threatening litigation if they refused to remove the child. Pet. App. 6a. The Massaros filed a timely administrative complaint with HUD alleging familial status discrimination by petitioner and also filed a federal lawsuit containing the same allegations.

In April, 1990, petitioner amended its bylaws to prohibit permanent residency in the Mainlands by persons under 55 years of age. Pet. App. 6a.[2] The bylaws amendment reserved to petitioner the right to grant hardship exemptions allowing residents under 55 years of age so long as 80% of the lots had one resident 55 years of age or older. Petitioner also passed a resolution to establish screening procedures to enforce the bylaws amendment. *Ibid.* The 55 years or older restriction that was added to the bylaws was not, however, made a part of the Declaration of Restrictions to the individual homes and was therefore not legally enforceable against homeowners in the Mainlands. See *id.* at 22a, 35a-36a n.8.

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[2] Although the United States and the Massaros argued in the district court and on appeal that the bylaw amendment was invalid under state law, the court of appeals did not resolve that issue. Pet. App. 19a. In our view, the bylaws were not validly amended in April, 1990, because petitioner did not comply with its own Article of Incorporation concerning the number of votes necessary to amend the bylaws.

In September, 1990, petitioner sent a letter to Gary and Carrie Mirabile, who lived in the Mainlands with their infant daughter, advising them that the presence of their daughter violated the age prohibition in the Declaration because she was under 16. Pet. App. 6a-7a. The Mirabiles filed a timely administrative complaint alleging familial status discrimination.

HUD investigated the two complaints and, in June, 1991, issued a charge of discrimination based on its determination that there was reasonable cause to believe that a violation of the Act had occurred. Pet. App. 7a. HUD found that petitioner failed to meet its burden of demonstrating that it qualified for the "housing for older persons" exemption because, prior to April, 1990, it had not published policies and procedures demonstrating an intent to make the Mainlands housing for persons 55 years or older, because it had failed to adhere to the policies it stated in its April, 1990, bylaws amendment and because it did not maintain adequate procedures to verify the age of persons owning homes in the Mainlands. *Ibid.*

Petitioner and respondents elected to have the HUD charge of discrimination resolved in federal court pursuant to 42 U.S.C. 3612(a) and (*o*). In accordance with 42 U.S.C. 3612(*o*), the Attorney General then commenced this civil action in district court in August, 1991, alleging that petitioner had discriminated against respondents based on familial status in violation of 42 U.S.C. 3604. The court consolidated this action with the action that had been filed by the Massaros in April, 1990, and conducted a four-day bench trial.

3. The district court disagreed with HUD's findings. In the court's view, petitioner satisfied the three requirements of the "55 years or older" housing definition and thus qualified for the "housing for older

persons" exemption under 42 U.S.C. 3607(b)(2)(C). Pet. App. 32a-39a.

In holding that petitioner satisfied the requirement that it publish and adhere to policies demonstrating an intent to provide housing for persons 55 years or older, the district court focused (Pet. App. 30a-36a) on three of the six factors listed in the regulation as relevant to that determination—age-verification procedures, written rules and regulations, and actual practices to enforce the rules and regulations. See 24 C.F.R. 100.304(c)(2)(iii), (v) and (vi).[3] The district court concluded that petitioner had adopted adequate age-verification procedures through its board of directors and "welcom[ing]" committee. Pet. App. 33a. As for written rules and regulations, the court held that petitioner's April, 1990, bylaws amendment satisfied this factor, even though the bylaw is unenforceable as a legal matter because it is not included in the Mainlands' Declaration. *Id.* at 33a-35a & n.8. With regard to actual enforcement practices, the district court found that petitioner's "letters to the plaintiffs in this case to enforce the bylaws," and the fact that petitioner "implemented screening procedures, through the welcome committee, in an attempt to remain above the 80% requirement," constituted "sufficient evidence to show that it has engaged in actual practices to enforce the rules or regulations that establish an intent to provide housing for older persons." *Id.* at 36a.

Having concluded that petitioner met the "policies and procedures" requirement of the statute, the district court concluded that petitioner satisfied the "significant

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[3] The district court and the court of appeals both concluded that the other three factors listed in the regulations (see note 1, *supra*) were not relevant on the particular facts of this case. Pet. App. 13a, 32a-33a.

facilities and services" and the "80% occupancy" requirements as well, and therefore qualified as "55 years or older" housing entitled to the "housing for older persons" exemption from the familial status discrimination prohibition of the Act. Pet. App. 37a-39a.

4. The court of appeals reversed. It concluded that the district court erred in finding that petitioner met the "policies and procedures" requirement of the statutory definition. The court of appeals concluded that the district court erred as to each of the three factors it considered in reaching that conclusion. Pet. App. 3a-24a.

With regard to the age-verification factor, the court concluded that the district court had erred both in failing to consider the status of the procedures at the time of petitioner's discriminatory acts and in overlooking pertinent evidence about petitioner's board and welcoming committee. Pet. App. 14a. The court reasoned that verification requires proof and emphasized that neither of the two resident surveys conducted by petitioner prior to the alleged discrimination required any independent proof of the age of occupants. The court also pointed to testimony by the person responsible for the second survey that conceded that the survey was being taken so petitioner "could prevent children from living in the community." *Id.* at 15a. In the court's view this "suggests that the age verification procedure was aimed more at excluding children than at including older persons." *Ibid.* The court found that the importance of a third survey was minimized because it was conducted after the alleged discrimination. *Ibid.*

As to the welcoming committee, the court found that the committee met with occupants only after they had moved into the complex, had no means of enforcing the age restriction, could not require occupants to meet with it, and did not distribute age-verification forms until

after the alleged discrimination. Pet. App. 15a. Thus, the court of appeals concluded that petitioner "had not instituted age-verification procedures adequately evidencing an intent to provide housing for persons 55 years of age or older prior to taking action against the Massaros and the Mirabiles." *Id.* at 16a.

The court also found that the district court erred in finding that petitioner had satisfied the "written rules and regulations" factor. It explained that the district court erred in considering the April, 1990, bylaw in regard to the Massaros' case because petitioner's attempt to exclude the Massaros' child occurred prior to April, 1990. Pet. App. 16a.[4] At the time of the action against the Massaros, the Declaration restricted residency to persons over 16, which did not evidence an intent to provide housing for older persons "because then any policy against families would suffice for the exemption, swallowing the rule against such discrimination." *Id.* at 17a. And while the April, 1990, bylaw was relevant to the Mirabiles' case, the court concluded that the district court erred in holding that its enactment established an intent to provide housing for older persons. *Id.* at 19a, 23a. Rather, the bylaw was only one factor to be weighed in the overall evaluation of petitioner's intent that the housing be for older persons. *Id.* at 19a, 23a.

Turning to the third factor of enforcing published policies and procedures, the court of appeals held that the district court erred in considering petitioner's screening procedures in this connection because those

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[4] The court of appeals noted that petitioner's president testified that, prior to the April, 1990, bylaws amendment, petitioner had no policies and procedures in place to satisfy the written rules and regulations factor. Pet. App. 23a n.32.

procedures were adopted after the date of the discriminatory acts. Pet. App. 20a. The court found that the district court had also erred by overlooking the pertinent facts that some realtors refused to abide by the screening procedure on the grounds that the Declaration had not been amended, that persons were "screened" only after they had bought a home, that some persons moved in without any contact from the welcoming committee, and that no hardship exemptions were requested or issued under the April, 1990, bylaw although persons under the 55-year age limit who were not otherwise supposed to move in did so. *Id.* at 21a-22a. In addition, petitioner's secretary and a board member both conceded that they did not believe the April, 1990, bylaw restricting residents to 55 years of age or older was enforceable. *Id.* at 22a.[5]

At bottom, the court of appeals found that petitioner "is only enforcing its restrictions to exclude children in a manner inconsistent with the Act," and not to limit residency to persons 55 years or older. Pet. App. 17a-18a. The court of appeals concluded (*id.* at 23a) that petitioner failed to prove that it had published and adhered to "policies and procedures which demonstrat[ed] an intent * * * to provide housing for persons 55 years of age or older" (42 U.S.C. 3607(b)(2)(C)(iii)), and therefore did not qualify for an exemption at the time of the

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[5] Because petitioner asserted that it was not attempting to enforce the bylaw against respondents, the court of appeals did not reach the issue of its enforceability. The court considered petitioner's adherence and enforceability procedures with regard to the bylaws only as a factor to weigh in determining whether petitioner intended to provide housing for older persons within the meaning of the Act. Pet. App. 23a & n.33. The court concluded that petitioner did not adhere to the bylaw and that petitioner did not believe it could be enforced.

discriminatory actions against the Massaros and the Mirabiles.

ARGUMENT

1. Petitioner claims (Pet. 6) that the court of appeals erroneously "requir[ed] the Mainlands to have a 100% new occupancy rate" by persons 55 years or older in order to qualify for the "housing for older persons" exemption under 42 U.S.C. 3607(b)(2)(C). Petitioner argues (Pet. 6-10, 12) that the court of appeals thus failed to defer to HUD's regulations permitting all incoming household members to be under 55 years of age as long as 80% of the community met the "55 years or older" standard.

The court of appeals, however, did not hold that petitioner must bar all individuals under 55 years of age from moving into the Mainlands. Rather, the court properly treated petitioner's lack of procedures for enforcing, and lack of adherence to, its April, 1990, bylaw restricting residents to 55 years or older as one relevant factor that, in combination with others, showed that there had been no "publication of, and adherence to, policies and procedures which demonstrate[d] an intent * * * to provide housing for persons 55 years of age or older." 42 U.S.C. 3607(b)(2)(C)(iii). The court of appeals also relied on admissions by petitioner's officials that they believed the 55 years or older bylaw was unenforceable and on petitioner's failure to establish any procedures for screening prospective residents or for verifying their ages prior to the discrimination against the Massaros and Mirabiles. See Pet. App. 14a-16a, 20a-22a.

Petitioner cites the preamble to HUD's regulations as supporting its argument that a housing provider need only remain above the 80% threshold to qualify for the

exemption (Pet. 8, 10, citing Pet. App. 79a-80a). Petitioner takes this portion of the preamble out of context, however. Although the preamble states that a housing provider can satisfy the 80% requirement even though it admits new residents under 55 years of age (see Pet. App. 79a-80a), the preamble also makes clear that satisfaction of the 80% requirement, by itself, does not qualify a defendant for the exemption. The housing provider must also meet the other two statutory requirements—having significant facilities and services for older persons and publishing and adhering to policies and procedures that demonstrate an intent to provide housing to persons 55 years of age or older. *Id.* at 80a-81a.

In the preamble, HUD expressly rejects the argument—which petitioner appears to endorse (Pet. 9-10, 13)—that a defendant can qualify for the exemption and still retain complete freedom to fill 20% of its housing units with persons of any age. HUD recognizes instead that a defendant's actions in filling an entire 20% of its units with persons under 55 years of age may show that it does not truly adhere to published policies and procedures so as to demonstrate an intent to provide housing for persons 55 years of age or older. See Pet. App. 80a-81a. The evidence in this case of new owners under 55 years of age being permitted to move in without obtaining the hardship exemption provided for by the bylaw amendment constitutes evidence to that effect.

2. Contrary to petitioner's contention (Pet. 19-20), the parties' stipulation that petitioner met the 80% factor did not constitute a concession by respondents that petitioner's age-verification procedures were accurate. The fact that the regulations do not specify what constitutes a valid age-verification procedure (see Pet. 19) does not undermine the court of appeals' conclusion that peti-

tioner's asserted procedures, which did not include any meaningful verification, were inadequate.

Petitioner also contends (Pet. 14-16, 19-23) that the court of appeals improperly engaged in *de novo* review of factual findings, reweighed the evidence, and ignored pertinent evidence. Review by this Court is not warranted to resolve these fact-bound questions. See, *e.g.*, *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, the court of appeals did not reweigh the evidence. It specifically concluded that the district court erred as a matter of law in several respects, including its consideration of petitioner's enactment of its bylaws amendment, screening procedure, and survey, all of which took place only after the discrimination, its holding that the enactment of the bylaw was conclusive on the question of intent, and its disregard of significant relevant evidence about the inadequacies of petitioner's age-verification method.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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